IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7984 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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SUPERINTENDING ENGINEER

Versus

GANPATBHAI HEMCHANDRABHAI SHRIMALI

Appearance:

1. Special Civil Application No. 7984 of 2000

MR SP HASURKAR for Petitioner No. 1

MR CB DASTOOR for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 09/04/2002

ORAL JUDGEMENT

Heard learned advocate Mr. Hasurkar for the petitioner and Mr. Dastoor for the respondent workman. By way of this petition, the petitioner has challenged the award made by the labour court in reference no. 733

of 1996 dated 1st October, 1999 wherein the labour court has granted reinstatement with continuity of service, with full back wages for the intervening period. Mr. Hasurkar has submitted that there was ample evidence against the respondent and it was made available before the labour court and the labour court ought to have taken it into consideration for the misconduct committed by the respondent workman. He has submitted that the labour court has erred in overlooking the evidence against the respondent which was on record before it. He has further submitted that the labour court ought to have considered whether the misconduct is found to be proved or not against the respondent on the basis of the inquiry papers which were before it alongwith the statements of the customers and other related persons. He has submitted that the serious misconduct has been committed by the respondent and only on technical aspect, that inquiry has been vitiated and only on the technical aspect, full relief has been given by the labour court. He has submitted that under the Rules of the Gujarat Electricity Board, summary procedure is permissible and the same has been applied and followed by the Board and there is no illegality committed by the labour court which would require interference of the labour court. He has submitted that the labour court has committed error in declaring that the inquiry against the respondent workman has been vitiated. Alongwith the rejoinder, the petitioner has produced certain papers relating to inquiry findings and final orders which were passed by the Board. He has submitted that before the labour court, once the inquiry was held to have been vitiated, thereafter, the respondent was examined and only on the ground that the petitioner board has not proved the charge of misconduct levelled against the workman, the order of dismissal has been held to be illegal and such findings given by the labour court are erroneous and required to be interfered by this court in exercise of the powers under Article 226/227 of the Constitution of India. Alternatively, he has submitted that the matter may be remanded back to the labour court for enabling the petitioner to prove the charge levelled against the respondent workman and such permission can be granted by this court while remanding the matter back to the labour court permitting the petitioner to lead evidence before the labour court for proving charge of misconduct levelled against the workman. In support of his submissions, he has relied upon the decision of the apex court in case of Neeta Kaplish versus Presiding Officer, Labour Court & Anr. reported in 1999 I CLR 219 and has submitted that looking to the charges levelled against the respondent workman, and also looking to the

statements of the customers of the GE Board, in such case, reinstatement ought not to have been granted by the labour court.

As against that, learned advocate Mr.Chirag B. Dastoor appearing for the respondent workman has submitted that the labour court has passed order below Exh. 31 and has declared that the inquiry has been vitiated. He has further submitted that the said order declaring that the inquiry has been vitiated has not been challenged by the petitioner before any higher forum till this date and, thus, the order declaring that the inquiry has been vitiated has been accepted by the petitioner board but thereafter, no further evidence was led by the petitioner before the labour court to prove the misconduct against the respondent workman and in absence of that, there is no material before the labour court to justify the misconduct and, therefore, the labour court was right in setting aside the order of dismissal and in making the award of reinstatement with full back wages for intervening period for want of proof of gainful employment and, therefore, this Court should not interfere with the award in question made by the labour court in exercise of the powers under Article 226/227 of the Constitution of India.

I have considered the submissions made by the learned advocates for the parties. I have also perused the award in question. Before the labour court, order dated 19th August, 1993 was challenged by the respondent workman by filing statement of claim at Exh.5. Under the said order, the respondent was dismissed from service. Certain documents were produced by the respondent at Exh. 6 and ... and the petitioner has produced documents vide list at Exh. 16. The respondent was examined at Exh. 15 before the labour court and the witness for the petitioner board was examined at Exh. 29. Thereafter, the labour court examined the question whether the inquiry held against the respondent was legal and proper or not and has come to the conclusion that the inquiry was illegal and was vitiated. That order passed below Exh.31 by the labour court has not been challenged by the petitioner before the higher forum. Again the respondent was examined before the labour court at Exh. 33 and thereafter, no oral evidence was led by the petitioner board to prove the misconduct committed by the respondent workman. This aspect has been taken into consideration by the labour court and it was of the view that once the departmental inquiry is vitiated, then, the papers forming part and parcel of the departmental inquiry held to be vitiated have no meaning and such papers have no

evidentiary value in the eye of law and such documents are required to be proved by the petitioner by leading oral evidence before the labour court. Such opportunity was granted by the labour court to the petitioner but the petitioner has not availed such an opportunity subsequent to the order vitiating the departmental inquiry and, therefore, the inquiry papers and other relevant papers would remain as they were without proving the same before the labour court and therefore, such documents cannot be relied upon by the labour court and the labour court has rightly not relied upon the said documents. The submission of Mr. Hasurkar for the petitioner is to the effect that the statements of the customers and other statements of the relevant persons which are not forming part and parcel of the departmental inquiry can be considered by the labour court. The submission made by Mr. Hasurkar cannot be accepted simply on the ground that such statements have been relied upon by the officer, while passing the order of dismissal and, therefore, such documents are required to be proved by the petitioner by leading proper and sufficient evidence before the labour court subsequent to the order passed below Exh.31 wherein the departmental inquiry has been held to have been vitiated. However, no evidence whatsoever was led by the petitioner thereafter and the matter remained as it was as if no misconduct has been proved and in such situation, the labour court was having no other option but to set aside the order of dismissal based upon the inquiry which was declared to have been vitiated by the labour court. This aspect has been considered by the apex court in case of Neeta Kaplish versus Presiding Officer, Labour Court & Anr. reported in 1999 (1) CLR 219 wherein the appellant was a clerk in the DMC College who had challenged the order of dismissal. It was held by the labour court that the domestic enquiry was not fair and proper and the management, when called upon to lead evidence, led no evidence except to produce the record of domestic enquiry. In the said case, in absence of any fresh evidence from the management side, the appellant also has not led any evidence. The claim of the appellant was dismissed by the tribunal and was then confirmed by the High Court. In the said decision, it was observed by the apex court that the domestic enquiry having been held to be not fair and proper, the evidence in domestic enquiry cannot be said to be material on record and the appellant was entitled to be granted relief. In the said decision, this aspect has been considered by the apex court in para 23, 24, 25 and 26. Said paragraphs are reproduced as under:

"23. IN view of the above, the legal position as emerges out is that in all cases where enquiry has not been held or the enquiry has been found to be defective, the tribunal can call upon the management or the employer to justify the action taken against the workman and to show by fresh evidence against the workman and to show by fresh evidence, that the termination or dismissal order was proper. If the management does not lead any evidence by availing of this opportunity, it cannot raise any grouse at any subsequent stage that it should have been given that opportunity, as the tribunal, in those circumstances, would be justified in passing an award in favour of the workman. If however, opportunity is availed of and the evidence is adduced by the management the validity of the action taken by it has to be scrutinized and adjudicated upon on the basis of such fresh evidence.

24. In the instant case, the appellant had questioned the domestic enquiry on a number of grounds including that her own answers, in reply to the questions of the Presiding Officer, were not correctly and completely recorded and that the enquiry officer was not impartial and was biased in favour of the respondent. It was further contended that her own witnesses were not called and she was not given the opportunity to lead evidence. The labour court has discussed a few of these grounds but has not given any findings on the bias of enquiry officer or the ground relating to incorrectly recording the statement of the appellant. The labour court, however, found that the enquiry was not fairly and properly held. It was after recording this finding that the labour court called upon the Management to lead evidence on merits which it did not do.

25. Learned counsel for the appellant contended that inspite of the direction by the labour court to the respondent management to lead evidence, it was open to the management to rely upon the domestic enquiry proceedings already held by the enquiry officer, including the evidence recorded by him, and it was under no obligation to lead further evidence, particularly as the management was of the view that the charges, on the basis of the evidence already led before the Enquiry Officer, stood proved. It was

also contended that under section 11-A, the labour court had to rely on the material on record and since the enquiry proceedings constituted material on record, the same could not be ignored. The argument is fallacious.

26. The record pertaining to the domestic enquiry would not constitute fresh evidence as those proceedings have already been found by the labour court to be defective. Such record would also not constitute material on record, as contended by the counsel for the respondent, within the meaning of section 11-A as the enquiry proceedings, on being found to be bad, have to be ignored altogether. The proceedings of the domestic enquiry could be and were in fact relied upon by the management for the limited purpose of showing at the preliminary stage that the action taken against the appellant was just and proper and that full opportunity of hearing was given to her in consequence with the principles of natural justice. This contention has not been accepted by the labour court and the enquiry has been held to be bad. In view of the nature of objections raised by the appellant, the record of enquiry held by the management ceased to be 'material on record' within the meaning of section 11-A of the Act and the only course open to the management was to justify its action by leading fresh evidence as required by the Labour Court. If such evidence has not been led, the Management has to suffer the consequences. "

Therefore, in view of the observations made by the apex court in the aforesaid decision, the record of enquiry held by the petitioner board including the statements of the customers and other related persons ceased to be 'material on record' within the meaning of section 11-A of the Act and therefore, in such a situation, the only course open to the management was to justify its action by leading fresh evidence as required by the Labour Court and if such evidence has not been led, the petitioner has to suffer the consequences and has to thank itself for not leading evidence for proving the charge levelled against the respondent workman. Vide Exh. 18, serious charge has been levelled against the respondent and the same was required to be proved otherwise that would become mere charge against the respondent without any proof. Therefore, according to my opinion, the view taken by the labour court on the basis

of the material on record and the law laid down by the apex court is just and proper that once the departmental inquiry has been held to have been vitiated and opportunity to lead evidence to prove misconduct against the respondent was given to the board but the board has failed to avail such an opportunity by leading proper evidence as required by the labour court. Therefore, in such situation, the only course open to the labour court was to set aside the order of dismissal because it cannot look into the papers of inquiry which was vitiated and unless such papers are proved by leading proper evidence, it is not open for the labour court to look into it. Therefore, according to my opinion, the labour court was perfectly right in overlooking such papers and in granting relief of reinstatement with continuity of service in record of the respondent workman and in doing so, the labour court has committed no error warranting interference of this court in exercise of the powers under Article 226/227 of the Constitution of India.

As regards back wages, according to my opinion, prima facie, the labour court has committed error in granting full back wages since it was passing an award only on technical ground. The respondent was dismissed by order dated 19th August, 1993 and the dispute was raised by the respondent in the year 1996, after about three years. Second aspect required to be taken into consideration is that the petitioner board is a public body and is a State within the meaning of Art. 12 of the Constitution of India and the third aspect is that the charge though not proved by the petitioner board but it was a serious charge and further, the workman concerned has put in only about eleven years' service prior to his dismissal from service. Taking into consideration all these aspects of the matter, according to my opinion, it would not be just and proper to financially burden the petitioner by granting full back wages. Looking to the delay in raising dispute, according to my view, back wages are required to be given only from the date of raising dispute in the year 1996. According to my opinion, it would be just and proper if the back wages are reduced from 100 per cent to 50 per cent alone and that too from the year 1996 in which dispute was raised by the workman.

Accordingly, for the reasons recorded hereinabove, this petition is partly allowed. The award made by the labour court in Reference NO. 733 of 1996 dated 1st October, 1999 is hereby modified only in respect of back wages to the effect that the respondent workman is entitled for back wages at the rate of 50 per

cent from the date on which the reference was made till 1st October, 1999 on which the award was made by the labour court. Rest of the directions issued by the labour court under the impugned award as regards reinstatement of the respondent in service with continuity have not been disturbed by this Court. Rule is made absolute in terms indicated hereinabove with no order as to costs.

Dt. 9.4.2002. (H.K. Rathod,J.)

Vyas